

1 the WHSG site is.

2 MR. MAY: May I, Your Honor?

3 JUDGE CHACHKIN: Yes.

4 MR. MAY: Oh, I, I think all this does is indicate
5 that he's made this map to show what the fullspacing require-
6 ments are.

7 JUDGE CHACHKIN: Are you questioning the reliability
8 of this map?

9 MR. SCHAUBLE: I think the map is incomplete, Your
10 Honor.

11 JUDGE CHACHKIN: Well, if the map is incomplete you
12 could bring it out on cross-examination.

13 MR. SCHAUBLE: And we, we don't agree with the, with
14 the characterization of what the available area is.

15 JUDGE CHACHKIN: Well, that's something to bring out
16 in cross-examination.

17 MR. ZAUNER: But, Your Honor --

18 JUDGE CHACHKIN: What's the Bureau's point?

19 MR. ZAUNER: Yeah. I was just going to say the
20 Bureau has an objection to this whole exhibit on the grounds
21 of relevancy. We, we know what the shortspacing is. That,
22 that's a given. The only question here is whether a waiver
23 should be granted. We know what the arguments, arguments are
24 in favor of waiver that are going to be espoused by Glendale.
25 And what, what does this -- which of those arguments does this

1 information go to?

2 JUDGE CHACHKIN: Yeah. What does this rebut, this
3 argument?

4 MR. MAY: Your Honor, it is the same to show that,
5 that within the fully spaced site area the tower of WFOX is
6 available and that when you run the technical service that
7 could be provided from that area there are very important
8 compelling public interest factors which suggest that one
9 should go to that site.

10 MR. ZAUNER: Then why doesn't --

11 MR. SCHAUBLE: Your, Your Honor --

12 MR. ZAUNER: -- Trinity go -- why, why doesn't
13 Trinity go there?

14 MR. COHEN: That's the question that I have. Yeah,
15 the --

16 MR. SCHAUBLE: And, Your Honor, I have other
17 objections.

18 JUDGE CHACHKIN: Well, then I'll --

19 MR. SCHAUBLE: I'm sorry, Your Honor.

20 JUDGE CHACHKIN: Mr. May, go, go ahead.

21 MR. MAY: I mean, the, the fact is is that when
22 Trinity moved to the site did it invest all of the resources
23 and time it did in developing that site, there was no short-
24 spacing issue. The fact that it subsequently was treated by a
25 grandfathering is acknowledged by the Agency and has since

1 time out of mind to be the fact that you're not going to
2 require the incumbent to go ahead and invest in redeveloping,
3 move to a site, and so on and so forth.

4 Now, Your Honor, with all frankness, the way counsel
5 for the Bureau, Mr. Zauner, has just characterized things, I
6 mean, I have to admit that in, in perhaps a real way what
7 we're dealing with here is simply a question of law, and the
8 question of law may be something that's sort of overriding our
9 considerations on all this, this factual presentation.

10 It, it -- what we have is Glendale's acknowledgement
11 that it did nothing. They didn't even investigate. And we
12 think the stipulations show that, that there are any fully,
13 fully spaced or other sites that they could locate at that
14 would be compliant with the Commission's rules. And that is
15 dispositive of the factual question. And Glendale stipulates
16 to that. I -- you know, I certainly see that the only thing
17 we're left with is, is Glendale's increase of the short-
18 spacing, and, and I think their increase to the shortspacing
19 is a matter which effectively you've already ruled on when you
20 denied the Motion for Summary, which is your increasing it.
21 Besides the, the Las Vegas --

22 MR. ZAUNER: No. The -- Your Honor, that's --

23 MR. MAY: Excuse me. The Las Vegas Valley --

24 JUDGE CHACHKIN: I didn't deny it.

25 MR. MAY: -- case --

1 JUDGE CHACHKIN: I just, I just said that there was
2 no basis for me to grant the Motion for Summary Decision
3 because it's -- they can present all the facts they want and
4 their arguments and this will be considered.

5 (Pause.)

6 JUDGE CHACHKIN: Well, what, what I said was that
7 you shouldn't understand by my denial of the Motion for
8 Summary Decision that this meant that I was rejecting their
9 contentions. All it meant was I didn't feel on the basis of
10 their arguments that they should be granted on paper, the
11 matter should be disposed of on paper, and that all the facts
12 -- and then determination would be made and this is -- and,
13 also, this is a -- something of a first impression. Whether
14 or not in the situation where, where the shortspacing would be
15 increased, even by a small amount, whether or not the
16 Commission would somehow on theory of substantial compliance
17 say that this satisfies it. I didn't know. That's not some-
18 thing -- it was something for me in case law which, which,
19 which allowed me to make a determination on that point. So,
20 obviously I therefore did not grant --

21 MR. MAY: I, I --

22 JUDGE CHACHKIN: -- the Motion for Summary Decision.

23 MR. MAY: I guess you've even further focused, of
24 course, Your Honor, and the fact is they are increasing it.
25 And, you know, the, the law that we argued at the time of the

1 Motions for Summary noted that we couldn't do that. The Rule
2 73610 and the notes that are applied to it indicate that we,
3 the incumbent, couldn't do it. And, so, if you're talking
4 about parity treatment under Las Vegas Valley and the like,
5 this isn't parity treatment. They're seeking preferential
6 treatment. That's not something they're entitled to and
7 that's perhaps rationally why the Commission when it issued
8 the HDO gave them the issue. But, again, that seems to be a
9 question of law.

10 I note, to the extent it may be helpful, that when
11 the Mass Media Bureau filed its opposition to Trinity's
12 Counter Motion for Summary in this matter on August 17, '93,
13 it, it provided the following, to simply describe, I guess,
14 where they thought the case was and where it was going. And
15 they said at page 3, going to page 3 -- or 2 going on to page
16 3 of the motion that, "The issue remaining for determination
17 at the hearing in this proceeding is whether Glendale can
18 demonstrate that there are no suitable nonshortspaced sites
19 from which Glendale could operate." Now, we could ask counsel
20 again if we've missed it. He, he hasn't addressed that issue
21 at all. In fact, he's done -- what he's acknowledged is he
22 never even looked for a fully spaced site. And if there's one
23 factual determination we're supposed to come out with at the
24 hearing, then that's it, we've already gone over it, and now
25 we ought to be arguing about what the legal consequences are

1 in the matter.

2 MR. SCHAUBLE: Your Honor, if I can --

3 MR. ZAUNER: Even if we buy that argument 100
4 percent, that would lead me to the conclusion that all this
5 information is, is irrelevant. If, if the fact is that they
6 have to show a fully spaced site in order to have their appli-
7 cation granted and they have not met that burden, then they
8 have not met that burden and they will not -- their applica-
9 tion cannot be granted. And this information is, is, is not
10 necessary.

11 MR. SCHAUBLE: Your Honor, could I go on to --

12 MR. ZAUNER: Isn't that a fact?

13 MR. MAY: Well, the reason that Trinity offered the
14 material was that we felt that it, it did provide the facts
15 and circumstances of the case which you must have. Then you
16 make the public interest considerations after you get through
17 the two previous thresholds.

18 JUDGE CHACHKIN: All right.

19 MR. MAY: That's why we --

20 JUDGE CHACHKIN: That's your position. Let --

21 MR. MAY: -- provided it.

22 JUDGE CHACHKIN: Let Mr. Schauble go forward.

23 MR. SCHAUBLE: Your Honor, Your Honor --

24 JUDGE CHACHKIN: Well, and let me, let me say this,
25 Mr. Zauner. There's one thing to have in the record the

1 question of whether or not there are -- they have made a show-
2 ing of whether there are sites available and it's another
3 thing to have in the record the fact not only did they make a
4 -- not make a showing but in fact there is evidence showing
5 that there is available site for the Commission to later on
6 consider.

7 MR. ZAUNER: Well, I respectfully disagree with that
8 because they have the burden of, of proof --

9 JUDGE CHACHKIN: I understand.

10 MR. ZAUNER: -- proceeding on that. And if they
11 fail to meet those burdens of proceeding and burdens of proof,
12 then it -- the legal significance of the fact that there may
13 be a site that would be fully conformant is -- conforming is
14 nonexistent.

15 JUDGE CHACHKIN: That may be, but sometimes cases
16 are not decided just on legal niceties who had the burden and
17 sometimes it's best to have a complete record showing what the
18 facts are so you don't have to deal with the burden situation.
19 And if there is evidence in the record showing that there is a
20 site available, showing -- which would meet all the Commission
21 criteria, if in fact that's the case, then it seems to me the
22 Commission has additional evidence on which to make a determi-
23 nation, a public interest determination.

24 MR. ZAUNER: Well, I might agree with you if there
25 was a question here of weighing the evidence, but here there

1 is a complete absence. There's an abdication here. Glendale
2 has indicated not only that -- they've indicated they've not
3 even looked to determine whether or not there is a, a fully
4 complying site.

5 JUDGE CHACHKIN: But Glendale is not prepared to
6 stipulate that there are in fact fully spaced sites available,
7 as I gather.

8 MR. COHEN: You're correct.

9 JUDGE CHACHKIN: And apparently they did, at the
10 time of the Motion for Summary Decision, which was just point-
11 ed out to me, were prepared to make a showing that there
12 weren't a fully available -- fully spaced sites available, at
13 least that's what I understand from what Mr. May read to me.

14 MR. COHEN: But, but now we are --

15 (Pause for many talking at once.)

16 MR. COHEN: That wasn't Glendale. That was the
17 Bureau speaking.

18 MR. ZAUNER: That was the Bureau that --

19 JUDGE CHACHKIN: All right.

20 MR. ZAUNER: -- quoting.

21 JUDGE CHACHKIN: The Bureau quoting. I'm sorry.

22 MR. COHEN: That was never --

23 JUDGE CHACHKIN: Well, I --

24 MR. COHEN: -- never Glendale's --

25 JUDGE CHACHKIN: -- I think the record should

1 reflect whether or not there are fully available -- if, if in
2 the rebuttal wants to make that showing, I agree that they
3 don't have to make that showing. It may be sufficient to just
4 rely on the burden that Glendale failed to meet its burden.
5 But if Trinity wants to go the extra mile and show affirmly to
6 the fact that there are fully available site -- fully spaced
7 sites available, I see no reason not to permit them to attempt
8 to make that showing.

9 MR. SCHAUBLE: Your Honor, can I bring out two
10 additional problems I have with this exhibit? Mr. Fisher's
11 exhibit does nothing to establish the actual availability of
12 the site.

13 JUDGE CHACHKIN: All right. Now --

14 MR. SCHAUBLE: If you, if you look at paragraph
15 seven, all he does is assume a site is available.

16 JUDGE CHACHKIN: Well, he's assuming the particular
17 site that Mr. Mullinax is talking about is available. He's
18 dealing with that particular site.

19 MR. SCHAUBLE: And then he, and then he goes on to
20 make arguments about why this is a technically superior site,
21 from paragraph seven to the end of the exhibit. And I have
22 two objections to that. One, is even assuming that the, that
23 the site in the -- even assuming, which Glendale disagrees
24 with the availability of the site, is, is relevant, but
25 there's no showing that the -- that there's any sort of

1 comparative coverage issue which is relevant to this
2 proceeding in that issue.

3 The second objection I have to this is that Mr.
4 Fisher showing is patently not in compliance with Commission
5 policy. If you look at the exhibit, particular tab F, it's
6 clear that he excluded noncommercial stations from his alleged
7 underserved area showing. Under the Commission's case of
8 Channel 32 Broadcasting Company, which is a 1991 Commission
9 case, the Commission held that whenever you do any sort of
10 analysis like this you must include noncommercial television
11 stations. Therefore, Mr. Fisher's showing is therefore defec-
12 tive on its face even if it is relevant, which Glendale does
13 not concede it is.

14 JUDGE CHACHKIN: What about that argument, that it
15 doesn't -- it's not -- it's defective?

16 MR. MAY: Well, in the first place, isn't --

17 JUDGE CHACHKIN: Because it doesn't include noncom-
18 mercial stations?

19 MR. MAY: I mean, it's not a, a -- there's no
20 comparative coverage --

21 JUDGE CHACHKIN: I understand, but it's --

22 MR. MAY: -- issue in this case.

23 JUDGE CHACHKIN: -- making the claim that it served
24 black coverage to white areas. Now, if it, it -- if it's
25 deficient, if it wasn't properly done, if it doesn't include

1 information as to noncommercial stations, then what is the
2 basis -- then how can I receive it as reliable, as competent?

3 MR. MAY: Well, it's an apples to apples comparison,
4 Your Honor. These -- this facility would allow a commercial
5 service to be provided for the first time to significant area
6 and it would, it would advance additional service to currently
7 underserved areas, commercial facility with commercial
8 facility. It is true that the --

9 JUDGE CHACHKIN: The Commission doesn't look at
10 that. The Commission puts them all together, commercial and
11 noncommercial. It doesn't show --

12 MR. MAY: That's --

13 JUDGE CHACHKIN: -- white area on the basis of
14 whether its commercial or noncommercial. That's the whole
15 point here.

16 MR. MAY: Well --

17 JUDGE CHACHKIN: Mr. Fisher should have included all
18 stations in determining whether it was a white area or not,
19 not just commercial or noncommercial. It doesn't matter. So,
20 his whole thesis here that it would serve a white area and all
21 the rest of his statements here are just irrelevant, are, are,
22 are not competent. And I don't -- and I can't receive it if
23 it's not competent. Because -- he's talking about white and
24 gray area, but if his study didn't include noncommercial
25 stations then it's not competent for that purpose to show

1 | whether it's a white or gray area.

2 | MR. COHEN: The law is clear on that.

3 | JUDGE CHACHKIN: I don't know why he didn't include
4 | that, but obviously it doesn't matter what's a commercial or
5 | noncommercial station. They're all television stations. They
6 | ought to be included in any study. So, the extent to which
7 | any of this evidence deals with service, it has to be rejected
8 | as not competent, since it doesn't -- the study did not take
9 | into consideration noncommercial stations.

10 | MR. SCHAUBLE: And, Your Honor, I would, I would ask
11 | that anything from paragraph seven on -- I believe that it's
12 | all setting up his predicate for his engineering study in
13 | describing his, his calculation study. And also tabs B
14 | through G, I would ask you to reject that on the basis that
15 | this is all based upon an incompetent showing.

16 | MR. MAY: Your Honor, with regard to Tab E, for
17 | example, there is a depiction here of the various services,
18 | even in the context of it being just commercial services,
19 | which show a shadowed area where there are five or more exist-
20 | ing services. This is rebuttal to what Mr. Mullaney has
21 | provided in page 9 of his statement where he indicates that if
22 | WHSG moved from its current site and moved to the WFOX site it
23 | would result in, in 375,496 people losing a service they
24 | presently receive. The value of that testimony we would
25 | submit is, is not relevant when you consider that the area

1 that purportedly these people would lose service at are al-
2 ready well-served versus the new service areas that would be
3 provided to underserved areas.

4 MR. SCHAUBLE: But, Your Honor, again --

5 JUDGE CHACHKIN: Well, now I'm confused. Did Mr.
6 Mullaney take into consideration commercial and noncommercial
7 stations?

8 MR. MAY: He makes no statement one way or the other
9 that he just limited it to commercial or that he only limited
10 it to noncommercial or he included both.

11 MR. SCHAUBLE: We, we didn't make any, any showing
12 concerning other services, Your Honor.

13 JUDGE CHACHKIN: Well, what did you make as showing
14 them? What was Mr. Mullaney claiming?

15 MR. SCHAUBLE: Talking about overall population,
16 Your Honor. Upon reflection, Your Honor, I think partially
17 what we were doing here were -- is we were anticipating the
18 possibility that Trinity might come up with some testimony
19 like this and --

20 JUDGE CHACHKIN: Now, wait a minute. Wait a minute.
21 As far as, as far as service is concerned, obviously it
22 doesn't matter whether or not there were other stations serv-
23 ing that area. We're talking about total service so we don't
24 care about the white area or gray area. We're talking about
25 just total service. Now, if Mr. Mullaney is talking about any

1 service provided that other stations don't provide, then
2 obviously we have to make a study of all the stations.

3 MR. SCHAUBLE: Your Honor, there was --

4 JUDGE CHACHKIN: Now -- go ahead.

5 MR. SCHAUBLE: Your Honor, there is nothing in the
6 exhibit here about service provided by other stations or
7 underserved area or, or matters such as that.

8 JUDGE CHACHKIN: Now, if Smith and Postenko dis-
9 agrees, wants to rebut Mr. Mullaney's contention about the
10 population that would be served, certainly they could do so.
11 But if they're talking about white and gray areas, then the
12 study has to encompass all stations. Service is provided by
13 all stations, commercial and noncommercial; otherwise it's not
14 competent.

15 MR. MAY: Well, Your Honor, I have to say that it is
16 provided not to be a comparative coverage exhibit but it was
17 provided to simply show commercial to commercial facilities.

18 JUDGE CHACHKIN: Commercial to commercial facility
19 is irrelevant for the Commission. The Commission is not
20 concerned about that. In determining whether or not that
21 there is white or gray area, the Commission looks at all
22 facilities, commercial and noncommercial. So, his claim that
23 it would serve a white area or gray area is, is, is wrong if
24 he didn't, if he didn't include noncommercial stations. It's
25 just plain not competent to prove that.

1 MR. MAY: He, he limited it to commercial stations,
2 Your Honor.

3 JUDGE CHACHKIN: Well, that's -- it doesn't matter
4 whether the -- that's irrelevant. The Commission doesn't
5 limit it to commercial stations. Well, to the extent to which
6 this exhibit deals with services provided by other stations or
7 service to white and gray areas, obviously it's not competent
8 since the study did not include both commercial and noncommer-
9 cial stations.

10 MR. COHEN: What are you striking, Your Honor?

11 JUDGE CHACHKIN: Well, anything that deals with
12 that. Now, we could start from the beginning of this.

13 MR. COHEN: Well, I think it's best that --

14 JUDGE CHACHKIN: I don't --

15 MR. COHEN: -- you rule so we don't have any, any --

16 JUDGE CHACHKIN: Well, I agree with you, so we'll --
17 what portion of this exhibit deals with services -- under-
18 served areas --

19 MR. SCHAUBLE: I think, I think we start on page --
20 paragraph seven, Your Honor, where --

21 JUDGE CHACHKIN: Paragraph seven.

22 MR. SCHAUBLE: -- Mr. Fisher starts setting up the
23 -- starts setting up his hypothetical proposal here.

24 MR. MAY: Your Honor, could I suggest something?

25 JUDGE CHACHKIN: Yes.

1 MR. MAY: It, it is, I note, a little past the noon
2 hour that you --

3 JUDGE CHACHKIN: Yes.

4 MR. MAY: -- designated for the break. Can we just
5 propose that during the noon hour we would look at this and
6 see if we couldn't come back and help to accelerate this
7 process --

8 JUDGE CHACHKIN: All right. We'll take a recess
9 till --

10 MR. MAY: Till when, Your Honor?

11 JUDGE CHACHKIN: -- 2:15. Yes?

12 MR. MAY: What time are we coming back?

13 JUDGE CHACHKIN: 2:15. See if you can work out
14 something as to which portions deal with underserved areas.

15 MR. MAY: Thank you.

16 (Whereupon, at 1:05 p.m. the hearing was recessed
17 until 2:15 p.m.)

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A F T E R N O O N S E S S I O N

(2:15 p.m.)

1 JUDGE CHACHKIN: Well, we have the stipulated
2 testimony, first of all, which is Joint Exhibit 1. And I
3 gather there's no objection to Joint Exhibit No. 1, which has
4 been previously identified, I believe?

5 MR. SCHAUBLE: That's correct, Your Honor.

6 JUDGE CHACHKIN: So, Joint Exhibit 1 would be
7 received.

8 (Whereupon, the document marked for
9 identification as Joint Exhibit No. 1
10 was received into evidence.)

11 MR. SCHAUBLE: Your Honor, shall I go ahead and
12 identify --

13 JUDGE CHACHKIN: Why don't you identify the others.

14 MR. SCHAUBLE: Okay. Your Honor, I would ask that
15 mark -- be marked for identification as Joint Exhibit 2 a
16 three-page document entitled, "Stipulated Testimony of John P.
17 Allen."

18 I ask to be marked for identification as Joint
19 Exhibit 3 a three-page document entitled, "Stipulated
20 Testimony of Gregory B. Daly."

21 I ask to be marked for identification as Joint
22 Exhibit No. 4 a three-page document entitled, "Stipulation
23 Made Public Service Announcements."

24 I ask to be marked for identification as Joint
25

1 Exhibit No. 5 a document consisting of four pages of text
2 followed by six pages of attachments entitled, "Stipulation
3 Testimony of Scott W. Jackson."

4 JUDGE CHACHKIN: All right. The documents described
5 by counsel will be marked for identification as Joint Exhibits
6 2 through 5.

7 (Whereupon, the documents referred to
8 as Joint Exhibit Nos. 2 through 5
9 were marked for identification.)

10 MR. SCHAUBLE: Your Honor, I have two additional
11 joint exhibits.

12 JUDGE CHACHKIN: Let's take up these first --

13 MR. SCHAUBLE: Okay.

14 JUDGE CHACHKIN: -- and we'll -- is there any
15 objection to Joint Exhibits 2 through 5?

16 MR. ZAUNER: Your Honor, the Bureau has no objection
17 to these exhibits and will state for the record that in at
18 least one of them the Bureau participated in the language
19 that's contained therein.

20 JUDGE CHACHKIN: All right, sir. Joint Exhibits 2
21 through, through 5 are also received.

22 (Whereupon, the documents marked for
23 identification as Joint Exhibit No. 2
24 through 5 were received into
25 evidence.)

1 JUDGE CHACHKIN: Now, you have some others, you say?

2 MR. SCHAUBLE: Two others, Your Honor.

3 JUDGE CHACHKIN: All right.

4 MR. SCHAUBLE: I ask to be marked for identification
5 as Joint Exhibit No. 6 a two-page document entitled,
6 "Stipulation Testimony of Lindee C. Connelly."

7 JUDGE CHACHKIN: That document will be marked for
8 identification as Joint Exhibit 6.

9 (Whereupon, the document referred to
10 as Joint Exhibit No. 6 was marked for
11 identification.)

12 MR. SCHAUBLE: And, finally, Your Honor, I ask to be
13 marked for identification as Joint Exhibit No. 7 a four-page
14 document entitled, "Stipulated Testimony of George F.
15 Gardner."

16 JUDGE CHACHKIN: And the document described is
17 marked for identification as Joint Exhibit 7.

18 (Whereupon, the document referred to
19 as Joint Exhibit No. 7 was marked for
20 identification.)

21 MR. SCHAUBLE: And, Your Honor, at this time I move
22 the documents into evidence.

23 JUDGE CHACHKIN: Are there any objections to those
24 exhibits?

25 MR. ZAUNER: Your Honor, the Bureau has no objection

1 to those exhibits.

2 JUDGE CHACHKIN: Joint Exhibit 6 and 7 are also
3 received.

4 (Whereupon, the documents marked for
5 identification as Joint Exhibit
6 Nos. 6 and 7 were received into
7 evidence.)

8 JUDGE CHACHKIN: All right. We'll be in recess till
9 9 a.m. tomorrow morning.

10 (Whereupon, at 2:30 p.m. on Tuesday, May 17, 1994,
11 the hearing was adjourned until 9:00 a.m. on Wednesday, May
12 18, 1994.)
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IN RE APPLICATIONS OF MONROE, GEORGIA

Name

MM DOCKET NO. 93-156

Docket No.

WASHINGTON, D.C.

Place

MAY 17, 1994

Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 11 through 154, inclusive, are the true, accurate and complete transcript prepared from the reporting by ALICE WEHNER in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

May 26, 1994
Date

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